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No. 10-576 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FIDEICOMISO DE LA TIERRA DEL CAÑO MARTÍN PEÑA,
Petitioner,

v.

LUIS G. FORTUÑO, ANTONIO M. SAGARDIA-DE JESUS, MUNICIPALITY OF SAN JUAN, JORGE SANTINI, AUTORIDAD DE ENERGÍA ELÉCTRICA, AUTORIDAD DE CARRETERAS, ADMINISTRACIÓN DE TERRENOS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In 2004, the legislature of Puerto Rico responded to the harmful and inhumane conditions affecting thousands of individuals, the environment and society in general by enacting Law 489. Law 489 orders various public entities to undertake a series of comprehensive projects that seek environmental remediation, infrastructure development, the elimination of urban blight and slum-areas, as well as other concededly public purposes. It is undisputed that these projects will be carried out by the government in the lands at issue here. On June 23, 2009, through an amendment to one section of Law 489, which was enacted as Law 32, the legislature transferred the lands from petitioner to respondents—all public entities—to advance these goals. Petitioner conclusorily alleges to this Court that this transfer to public entities was a pretext to benefit identifiable private individuals. In transferring the lands to public entities, however, the legislature, by the very terms of the amendment, left intact the projects to be carried out in the lands, as well as the other goals of Law 489. In the courts below petitioner did not argue otherwise. Petitioner also did not argue below that the actual and primary motivation of the legislature was instead to confer direct benefits upon favored, identifiable private individuals.

The questions presented are (1) whether petitioners have properly preserved any pretext claim, and (2) whether the Court of Appeals applied the correct legal standard in rejecting the Takings Clause challenge.

PARTIES TO THE PROCEEDINGS

Petitioner is the Fideicomiso de la Tierra del Caño Martín Peña.

Respondents on whose behalf this brief is filed are: the Honorable Luis G. Fortuño, Governor of the Commonwealth of Puerto Rico, Antonio M. Sagardía, Secretary of Justice,[1] Jorge Santini, Mayor of San Juan, the Municipality of San Juan, the Puerto Rico Electric Power Authority, the Puerto Rico Highway and Transportation Authority, and the Puerto Rico Land Administration.

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[1] Mr. Sagardía has been substituted by Mr. Guillermo Somoza Colombani as Secretary of Justice of the Commonwealth of Puerto Rico.

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BRIEF IN OPPOSITION

STATEMENT

This case arises out of the effort by the legislature of the Commonwealth of Puerto Rico to address in a comprehensive and integrated manner the harmful conditions posing a direct threat to communities, the environment, and society in general. The lands at issue here originally consisted of inhabitable mangroves, swamplands and a canal located in the heart

of San Juan. Since the mid-twentieth century citizens from rural areas of Puerto Rico have periodically invaded the lands. These citizens have built settlements by filling the canal and the adjoining wetlands with trash and rubbish in order to make the terrain firm enough to support structures made of salvaged wood and corrugated tin. Through this time, the settlers have also disposed of their trash, and untreated sanitary waste in the canal and adjoining wetlands. These actions eventually lead to a state of environmental crisis, unplanned urbanization, and concededly blighted conditions. Through Law 489, the legislature authorized a comprehensive project directed towards the environmental remediation of the area, and its subsequent redevelopment. The legislature explicitly determined that the project was to be carried out by government agencies, mostly respondents, and estimated that it will last around twenty years. By way of Law 32 the legislature amended a single section of Law 489, and transferred the lands where these projects are to be carried out to respondents. Petitioner alleges that this transfer is a pretext to confer private benefit on identifiable private individuals.

As the First Circuit observed, however, the amendment, by its own terms, left intact respondents statutory obligations and the public use to be given to the lands in carrying out the projects. As that court further observed, petitioner has not alleged that through Law 32 the legislature somehow relieved respondents from their obligations or that it abandoned the objectives of Law 489. While petitioner did conclusorily argue that the effect of Law 32 would be to abandon a goal of Law 489 of trying to avoid displacement of the residents of the area, it did not argue that the legislature had

abandoned the more specific public purpose of eliminating conditions harmful to the public. Petitioner also did not allege that the actual and primary purpose of the amendment is to benefit known private individuals. Because petitioner failed to make a plausible accusation of impermissible favoritism, or to allege a plausible violation of the Public Use Clause, petitioner has not properly raised a pretext claim.

A. The Area in Question[1]

The area in question originally consisted of inhabitable mangroves, swamplands and a canal. It is located in the heart of San Juan. Since around the mid-20th century residents from rural areas of Puerto Rico have been migrating to this area. Because its natural characteristics made it impossible to support structures, the migrants made the area habitable by sinking garbage, rubbish and debris in order to make the surface firm enough to support structures eventually built with corrugated tin, salvaged wood and other inadequate materials.

Given this unplanned urbanization, sewer and storm-water systems, as well as proper roads, have never been built or assembled. Residents have therefore disposed of their trash and untreated wastewater into the canal and adjoining wetlands for decades. Most of the area is also devoid of electric power and potable water services, as well as other basic utilities.

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[1] The facts described in this section are derived from the Statement of Motives of Law 489 and other facts which are undisputed. *See* Pet App. 8a-16a, 57a-66a.

The residents are understandably well below the poverty level, and the area is concededly blighted and in a precarious infrastructural state. More importantly, the filling and dumping practices just described have led to a state of environmental crisis that poses a direct threat to the health of the residents and society in general, as well as to the entire San Juan Estuary System and other adjacent bodies of water. For example, given the massive and widespread illegal dumping practices, there has been a substantial alteration of the natural flow of the water systems that originally existed in the area. The principal effect is that in times of rain, the area floods dramatically. When floods occur, decades of contamination surface into alleys, and into people's homes and adjacent structures. These contaminants also reach waters of the United States, including the entire San Juan Bay Estuary system and its adjacent bodies of water. This, of course, exposes the environment, the communities, and society in general to harmful and extremely dangerous conditions that have a direct, detrimental effect on health and safety. It also exposes the Commonwealth to unprecedented penalties by both federal and state agencies.

B. Law 489

The legislature of the Commonwealth of Puerto Rico passed Law 489 in September 24, 2004 to respond to the harmful and inhumane conditions described above. By way of Law 489 the legislature engaged in "one of the most transcendental projects to be undertaken by the Government of Puerto Rico." Pet App. 57a-58a. The legislature recognized that "[t]he Government of Puerto Rico [under the direction of respondent Autoridad de Carreteras (Puerto Rico Highways and Transportation Authority)] has already

invested resources for contracting studies to comply with the applicable environmental legislation for the project to dredge the Canal, in the preparation of the Land Use Plan, and in the development of an Integrated Development Plan." Pet App. 61a. The legislature further recognized that both plans are "fashioned as corrective action plans against the situation of environmental degradation and pollution, the vulnerability to natural and anthropogenic hazards, and the limitations of the social and economic structure that perpetuate poverty." *Id.* 61a. Accordingly, through legislation, it created a "mechanism whose purpose is to articulate the implementtation of the Martín Peña Canal ENLACE Project efficiently [.]" *Id.* 57a.

The legislature's stated public purposes appear in Section 3 of Law 489. *See* Pet App. 70a. The more principal public purposes are "Environmental" and "Socio-economic." *Id.* 70a-71a. The legislature's "environmental" purpose specifically is "[t]o enable the rehabilitation of the San Juan Bay Estuary, improve the quality of its waters and the habitat of its fauna and wildlife by broadening and dredging of the Martín Peña Canal and conservation strip along both banks thereof." *Id.* And the "socio-economic" purpose is "[t]o improve the living conditions of the approximately thirty thousand (30,000) residents of the eight communities located along both sides of the Canal in the areas of public sanitation, housing, ordinance and quality of the urban spaces and the infrastructure. To achieve a healthy and enriching relationship between the communities of the sector and their urban surroundings, the recovery of the potential for tourism, recreation and education of the Canal[.]" Pet App. 71a.

In recognizing the hardship that the projects could cause the poor residents of the area, the legislature also adopted a policy of preventing resident dislocation. *See Id.* For example, the legislature will construe new housing facilities within the area for relocating residents. *See* 1st Cir. App. 1434.[2]

The legislature also created a public corporation to, *inter alia*, "be the entity responsible for coordinating the implementation of all aspects of the ENLACE Project; including, without being limited to, housing development, infrastructure, the dredging and canalization of the Canal, as well as urban and socio-economic development." Pet App. 76a. This public corporation is called the ENLACE Corporation.

The legislature also directed the different public agencies of the Commonwealth—primarily respondents—to "contribute to the development of their corresponding projects and programs identified in the Integrated Development Plan and the Land Use Plan of the District to make viable the implementation of the ENLACE Project," and that they "shall collaborate with and support the activities, initiatives and projects furthered by the Corporation, according to their responsibilities, functions and capabilities, and in close coordination with the Corporation." Pet. App. 94a-95a. A similar section is devoted to the Municipality of San Juan. *See Id.* 96a-97a. By way of Section 16 of Law 489 the legislature transferred to the ENLACE corporation all of the lands where the

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[2] References to the Appendix submitted in the First Circuit are cited as "1st Cir. App." followed by the page number.

projects will be carried out by respondents. *See Id.* 101a.[3]

C. The Amendment to Law 489, Law 32

On May 14, 2009, even though over four and a half years after passage of Law 489 no public work had officially begun, the ENLACE Corporation transferred all of the lands it came to own under Section 16 to petitioner. Petitioner claims to be a private entity that, as of this date, acquired private rights over these lands.[4]

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[3] The Development Plan contains essentially the same goals and objectives as the statute. Some excerpts of the plan were submitted to the courts below. *See* 1st Cir. App. 1387-1471.

[4] Although in its Statement of the Case (Pet. 3) petitioner assets—in a wholly conclusory fashion as "facts"—that it is a "private entity" which acted as "collective landowner," it fails to provide any citation of support in the record. *See* Pet. App. 18a-19a, 41a-42a. Respondents respectfully point out that it was highly disputed below both whether petitioner is a private entity or that it could acquire private, independent rights over these lands. *See Response Brief for All Appellants*, at pp. 29-86 (1st Cir. Case No. 09-2569). As to the latter, respondents argued, *inter alia*, that even assuming that petitioner was a private entity, under Puerto Rico law lands destined for public works cannot be privatized until the public work is eventually completed, or it is determined that no public work will be carried out on the plot—none of which was present here. Respondent explained to the courts below that unless such conditions are satisfied, the lands destined to a public use constitute public domain lands and cannot be privatized. *Id.* 61-62. Respondents argued that even assuming arguendo that the legislature had authorized the Corporation to eventually privatize these lands, it did not exempt it from this general rule. Respondents reasoned that, consequently, the lands could only be privatized once the public projects were completed. The First Circuit, however, assumed without deciding that petitioner was a private entity which acquired private rights over the lands on

Approximately one month later, the legislature passed Law 32. *See* Pet App. 135a. Through Law 32 the legislature recognized that in Section 16 the lands were transferred to the Corporation "for the implementation of the Public Policy set forth in act No. 489." *Id.* 136a. With this in mind, the legislature amended Section 16 and re-transferred the lands back to the public entities that originally owned them, namely respondents.[5] The amendment, however, by its own terms[6] left intact the provisions, goals and purposes of Law 489 which are to be implemented in the lands at issue. *See Id.* 137a. Respondents' statutory obligations (*Id.* 94a-97a), also remained intact. *See Id.* The legislature, moreover, recognized that "Public agencies, which term includes all agencies, public corporations and instrumentalities of the Commonwealth Government and the municipalities, may have their own objectives, purposes, and programs pursuant to the laws, regulations and programs that apply to them" which can

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May 14, 2009 in dismissing the case on the merits. *See* Pet. App. 19a-20a.

[5] Other state and federal agencies will participate in the project. These include, among others, the United States Army Corps of Engineers, pursuant to the Intergovernmental Cooperation Act, 31 U.S.C. § 6506, the Environmental Protection Agency, the Commonwealth's Department of Natural Resources, the Puerto Rico Department of Housing, and other Commonwealth utility agencies.

[6] Law 32 amended Law 489 "to read as follows." It is a widely recognized principle of statutory interpretation that "[w]hen a statute is amended 'to read as follows' or is otherwise reenacted as amended, the original act or section is merged with the amendment." *See* Singer, Norman, *Sutherland Statutory Construction*, Ch. 1A § 22:38 (6th ed.)

assist to advance the objectives as Law 489 faster and more efficiently.[7] *Id.* at 136a.

The legislature ordered respondents to, upon the transfer, "assess and evaluate[ ]...[the lands] in order to determine whether these shall remain the property of such dependencies or whether, in their judgment and pursuant to the applicable laws and regulations" these can be transferred forward, "provided, that such action does not deprive citizens from essential services." Pet App. 138a-139a. This study reflects the legislature's desire that respondents identify those plots necessary to carry out the public works mandated by Law 489 and the development plan.[8]

The amendment provides for two types of transfers. First, it states "[t]he public agencies, as defined in this Act, that manage, have custody, have dominion over, lease or own lands in the District may transfer the respective title deed to the [ENLACE] Corporation, insofar as such transfer does not contravene any legislation, regulations, programs, objectives, fiscal situation, and public policy considerations of the public Agency in question." Pet App. 137a. Second, it contemplates the possibility of eventually transferring some lands to individual residents of the area.[9]

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[7] The legislature also made abundantly clear that the amendment cannot have the effect of affecting current services to the citizens of the area.

[8] As noted above, under Puerto Rico law lands destined for public works cannot be transferred. *See* n. 3, *supra*. Thus, if a plot of land is necessary for public work it cannot be privatized and must therefore be either kept by the entity or transferred to another public entity.

[9] It is undisputed that most of the area will be directly impacted by the many projects to be carried out. *See* 1st Cir. App. 1433-1435. *See also Id.* 1205(Noting that all of the lands at

If such is the case, however, the legislature—in keeping with the legislative policy of minimizing the displacement of the residents of the area because of the redevelopment works—sought to incentivize the residents' permanence in the area by severely restricting any potential economic benefits the transferee may derive from a sale, in the event it decides to later transfer a given plot.[10]

D. The Case Resolved in the Decisions Below

1. Law 32 was signed into law by respondent Fortuño on June 23, 2009. Two days later, on June 25, 2009, petitioner brought suit in the United States District Court for the District of Puerto Rico challenging the constitutionality of the transfer of the lands to the public entities. Among other claims, in the complaint petitioner claimed that Law 32 violated the Takings Clauses of the Constitutions of the United States and Puerto Rico.

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issue are essential or "[t]he severe contamination will continue to foster.") There is, therefore, no certainty as to when the lands at issue can be transferred.

[10] Specifically, if "a person that is granted the title of a property resolves to sell or otherwise transfer the same on or before ten (10) years of the execution of such title, such beneficiary shall reimburse the Municipality of San Juan or the Agency assigning such ownership title seventy-five (75) percent of the value of the lot at the time of the sale" or transfer. Pet App. 139a-140a. A mortgage of the property is included in the term "sale." *See Id.* Nonetheless, a person "may be exempted from compliance" with these provisions if, *inter alia*, it "obtain[s] a mortgage loan to make improvements to the property without cash out." *Id.* For this—which empowers some individuals to be able to independently improve the area themselves—the individual needs to obtain a "certification" from the Department of Housing. *See Id.*

In its complaint, petitioner alleged that "[w]hile Law 489 remains in effect..., Article 16 of the Law—pursuant to which titles to land had been transferred to the Corporation in 2005 and thereafter to the Fideicomiso—was radically altered." 1st Cir. App. 13. Petitioner further alleged that "[t]he effect of the law is to abandon a development plan which has been approved and/or adopted by the...Legislature of Puerto Rico" and other state entities. Petitioner, at this time, however, did not elaborate the conclusory allegation that "the development plan...has been abandoned." Petitioner also alleged that "[t]he law contemplates the possibility of providing land titles to individuals who are to be evaluated by these government agencies, but there is no guarantee that there will be such transfers." *Id.*

On June 29, 2009, the district court *sua sponte* issued an order expressing great concern with certain jurisdictional and comity issues which it understood had to be considered prior to it taking any action in the case. *See* 1st Cir. App. 83-85. One of these issues was *Pullman* abstention. *See Id.*[11] The district court granted the parties until July 31, 2009 to brief these issues. It also granted respondents until said date to file motions to dismiss.

On July 31, 2009 respondents filed their motions to dismiss. In its motion to dismiss the Municipality noted that the amendment left intact "the provisions of Law 489, including its purpose, the policy choices and options enunciated therein" which are to be carried out in the lands at issue. 1st Cir. App. 359. The Municipality also argued that petitioner had

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[11] The Court later added one additional issue to be briefed. *See* 1st Cir. App. 176.

failed to properly plead that actual or primary purpose of the statute was not to favor identifiable individuals. *See Id.* 380-388.[12] On August 20, 2009 petitioner opposed. In its opposition petitioner framed its argument as follows: "[t]he Municipal defendants once again misconstrue the nature of plaintiff's claim, asserting that the Law 32 challenge is based on the fact that the law contemplates the possibility of providing title to unspecified individuals....With this erroneous notion as a starting point, the Municipal defendants then argue that plaintiff cannot demonstrate that any specific private individuals have been benefited by the land transfers mandated by Law 32. Plaintiff certainly is not contending that urban redevelopment projects are invalid if they ultimately may benefit some private individuals....The claim, rather is that *this particular law*, which *ipso facto* reverses property transfers which have already taken place...is unconstitutional, because it is not based on any legitimate purpose." *Id.* 908-909. Petitioner did not elaborated on what it based this conclusion.

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[12] The Municipality of San Juan also argued below that the mere fact that the legislature contemplated the possibility of eventually transferring some parcels to as yet unknown individuals and not to the trust (as an allegedly private collective holder of land)—as a mean to advance the statutory objective of preserving the communities—this does not render the statute unconstitutional. Though petitioner uses this argument to say that respondents gave inconsistent arguments below, the Court can easily assess that respondents did not argue that this was the primary or actual purpose of the statute, or that this was the only policy objective of Law 489. Respondents rather noted, time and time again, that the statute had multiple purposes which were not altered by the amendment. *See* 1st Cir. App. 359.

On November 10, 2009, the district court dismissed the complaint on *Pullman* abstention grounds. Petitioner appealed this ruling to the First Circuit on November 16, 2009. Petitioner's brief to the First Circuit barely elaborated on its takings challenge. Pet App. 55-56. But it nevertheless elaborated in what it meant by its conclusory allegation that the "effect of the amendment is to abandon [the] Development Plan." Petitioner's specific argument was that "[t]he Fideicomiso is not even *mentioned* in the Statements of Motives [of the amendment]." *Brief of Appellant* at 56 (1st Cir. Case No. 09-2569) (emphasis in original). If followed, according to petitioner, that the entity will suffer and the residents would be in danger of being displaced. *See Id.* It did not argue, however, that through the amendment Law 489's more specific purpose—eliminating conditions harmful to the public—had somehow been abandoned or will not be carried out.[13]

After oral argument was held, the court of appeals ordered the parties to file supplemental briefs on the Takings Claim. In its supplemental brief, plaintiff framed its public use challenge as follows: "whether the Government can establish Law 32's compliance with the Fifth Amendment's 'public use' requirement. It contends that Law 32 is not the sort of independent

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[13] For example, though petitioner argued in its brief to the First Circuit plead that respondent Mayor Santini, who himself is not a member of the legislature, appeared publicly declaring an intention to provide land titles to unspecified residents of the area at some unspecified moment in time, and exhorting them to cooperate with the Municipality in the studies to be conducted on the lands (*see* 1st Cir. app. 14), petitioner has not argued that Mayor Santini intends to give away lands in a way that would cause an abandonment of the governments' public purposes.

comprehensive plan that warrants deference under *Kelo*." *See Petitioner's Supplemental Brief on Remedies Available on a Takings Claim* at 4 (1st Cir. Case No. 09-2569). Petitioner again argued that the end result of Law 32 would contravene one of the goals of the plan—to avoid displacement of community residents. But again petitioner did not argue that through Law 32 the Commonwealth abandoned the projects directed to remedy conditions harmful to the public.

2. On April 28, 2010, the Court of Appeals for the First Circuit issued its opinion. *See Fideicomiso de la Tierra del Caño Martín Peña v. Fortuno*, 604 F.3d 7 (1st Cir. 2010) (Lynch, C.J.), (Pet. App. 1a). In that opinion the court of appeals directed the district court to enter judgment dismissing with prejudice all federal claims raised by petitioner, including its Takings Clause claim.[14] In so doing, the court noted that petitioner "brings an unusual Takings Clause claim." *Id.* 2a. It observed that petitioner "correctly admits" that Law 489 "serves a number of public purposes..." (*Id.* 3a), and that petitioner recognized its comprehensive character (*Id.* 15a). The court then went on to address "[t]he more specific public purposes" of the statute which, the court noted "is to remove conditions harmful to the public." *Id.* at 4a.

The court of appeals then analyzed the amendment to Law 489, Law 32. It correctly noted that "Law 32, by its terms, left intact most of the rest of Law 489, including its statement of goals and section 5048,

[14] The court of appeals also dismissed petitioner's claims under the Due Process Clause, the Contracts Clause, and the Ex Post Facto Clause for its failure to properly develop these arguments before the district court or to preserve these arguments on appeal. *See* Pet. App. 25a.

the section that created" petitioner (Pet App. 14a-15a). The court of appeals further observed that while petitioner did argue that "the end result of Law 32...will be to end community participation in the ENLACE Project, to allow public agencies to facilitate speculation by private developers, and to displace community residents", it was not arguing that Law 32 "relieves public agencies from the obligation to advance the goals of the ENLACE Project identified in Law 489." Pet. App. 20a-21a.[15]

The court of appeals went on to note that the controversies under Puerto Rico law that the district court found appropriate for the exercise of *Pullman* abstention did not have to be considered if petitioner's "'public use' argument fails." Pet. App. 19a-20a ("Irrespective of whether the Fideicomiso is, as it claims, a private owner of lands considered private property under Puerto Rican law, it cannot obtain the relief it seeks if its 'public use' argument fails.") Thus, the court of appeals entered into the merits of plaintiff's Takings claim, as petitioner had suggested in its supplemental brief. *See Plaintiff's Supplemental Brief on the Remedies Available on the Takings Claim* at 13 ("This Court has the power to [ ] decide the merits of this case at this juncture[.]")

The court of appeals recognized that the arguments made by petitioner regarding a possible displacement of community residents and reduction of community participation were "serious arguments." Pet. App 21a The court, however, concluded that because there is

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[15] In a footnote the court of appeals added that "[t]he fact that under Law 489 the land may, after improvements, be leased to private parties does not mean that Law 489 lacks a public purpose, *see Berman v. Parker*, 348 U.S. 26, 33-36 (1954), nor does the Fideicomiso so argue."

not even an allegation that the concededly public policy goals of Law 489 will not be carried out, and the amendment, on its face, reflects that these must still be carried out, "they are not grounds for a claim under the Takings Clause of the U.S. Constitution." Pet. App. 21a

Judge Torruella concurred. He wrote separately "to clarify [his] view that Law 32 pursues the public purposes of economic, social, environmental, and community redevelopment that were carefully plotted in Law 489." Pet. App. 26a.[16] Judge Torruella emphasized that "Law 32 amended *one Article of Law 489*—Article 16—and maintained Law 489's comprehensive provisions that define the policy goals behind the ENLACE Project. As the Commonwealth argues, the principles, purposes, and objectives of Law 489 are in effect." *Id.* at 31a. Judge Torruella further observed that, "[i]t is uncontested that the ENLACE project was adopted to rehabilitate and revitalize the Martín Peña Canal and its communities; it seeks to conduct extensive public works and improvements and to deal with environmental degradation, and land ownership issues." *Id.* at 32a-33a. Judge Torruella concluded that "[t]hese are public purposes that were adopted in the context of a thorough, comprehensive, and detailed development plan, that pursuant to Law 32 will be carried out

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[16] Judge Torruella outlined the issue presented to the court of appeals as the majority did. *See* Pet. App. 29a-30a ("The Fideicomiso stresses that the Government has failed to articulate a coherent and legitimate explanation of the public purposes behind Law 32. The Fideicomiso also contends that in allowing the Commonwealth to place land titles among a host of public agencies, Law 32 contravenes Law 489's goals to foster community participation, and avoid speculation and displacement of the communities.")

through the intervention and active participation of several public agencies." *Id.* at 33a. Judge Torruella, therefore, agreed with the panel.

3. Petitioner moved for rehearing or rehearing en banc. In its motion petitioner reiterated its speculative argument that Law 32 had the effect of abandoning the goal articulated in Law 489 to minimize displacement of the communities. *See Petition for Panel Rehearing and/or rehearing En Banc*, at 4-6 (1st Cir. Case No. 09-2569). As in previous filings, petitioner did not argue that the actual purpose of Law 32 is to abandon the primary public purpose of eliminating conditions harmful to society in general, or to confer benefits on specific private individuals. On June 3, 2010, the First Circuit unanimously denied the petition for rehearing or rehearing en banc. *See* Pet. App. 55a-56a.

ARGUMENT

I. THE COURT SHOULD NOT REVIEW THE QUESTION PRESENTED IN THIS CASE BECAUSE PETITIONERS DID NOT RAISE SUCH A QUESTION IN THE COURTS BELOW

1. A fundamental prerequisite of this Court's review of federal constitutional questions is that the same question have been pressed or passed on in the court below. *See Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969). That requirement has not been met in this case. Contrary to Petitioner's assertion, the federal question that petitioners now ask this court to address was not timely or properly raised in the court of appeals or in the district court.

2. A pretext is an "[o]stensible reason or motive assigned or assumed as a color or cover for the real reason or motive." *Black's Law Dictionary* 1187 (6th ed. 1990). In *Kelo v. City of New London*, this Court defined a pretextual public purpose in the Takings Clause context as being one where "the actual purpose was to bestow a private benefit on a particular private party." 454 U.S. 469, 478 (2005). *See also Id.* at 490 (Kennedy, J., concurring) ("transfers intended to confer benefits on particular, favored private entities, and with only...pretextual public benefits, are forbidden by the Public Use Clause.") Pertinent to this analysis is that where the condemnation's "actual," "direct" or "primary" purpose is to achieve a public benefit, the action at issue satisfies the Public Use Clause. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26, 30, 34 (1954); *Goldstein v. Pataki*, 516 F.3d 50, 63 (2d Cir. 2008); *cert. denied*, 554 U.S 530 (2008); *Carole Media LLC v. New Jersey Transit Corp.*, 550 F.3d 302, 311 (3rd Cir. 2008). *See also Kelo*, 454 U.S. at 500 (O'Connor, J., dissenting).[17]

To properly plead a pretext claim a plaintiff must accordingly allege sufficient facts that lend themselves to the plausible inferences that (1) the government's stated purpose is not primarily a public one, and (2) the actual purpose of the action is to impermissibly confer a private benefit on particular,

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[17] Justice O'Connor has observed that takings which "directly" achieved public benefits are, among others, those seeking the elimination of a "harmful property use." 445 U.S. at 500. *See also Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs.")

identifiable individuals. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). *See also Kelo*, 545 U.S. at 491 (Kennedy, J., concurring). Petitioner, however, has failed to meet this standard. Because petitioner cannot seek in this Court's review of a claim that was not properly presented to or ruled on by the courts below, the Court should reject that attempt.

A. Petitioner's Failure To Establish That The Concededly Public Use Of The Lands At Issue Has Been Abandoned Defeats Any Takings Claim It May Have

In considering petitioner's own admissions and pleadings the First Circuit, found that "there can be no doubt that Law 32's transfer to public ownership is for 'public use' under the Takings Clause." Pet. App. 22a-23a. In reaching this conclusion, the First Circuit properly observed that petitioner conceded that the projects to be carried out under Law 489 have a valid public purpose, that these are based on comprehensive planning, and that the lands in question are necessary to carry them out. *See* Pet. App. 3a, 15a, 21a. *See also Petition for Panel Rehearing and/or rehearing En Banc* at 4 (1st Cir. Case No. 09-2569) ("There can be no doubt that both Law 489 and the 2006 Development Plan approved pursuant thereto satisfy 'public use.' The record establishes the comprehensive nature of a plan designed to address serious infrastructure and environmental concerns of the more than 25,000 residents of the sector and to preserve community integrity and permanence."); *and* 1st Cir. App. 1205 (Noting that the lands are essential or "[t]he severe contamination will continue to foster.")

In its analysis of petitioner's claims, that court, and the concurring judge, also correctly observed that the statutory amendment in question, Law 32, by its own terms left intact all of the public purposes, projects and objectives which seek to eliminate conditions harmful to the public. *See* Pet. App. 14a-15a, 22a. *See also Id.* at 31a (Torruella, J. concurring).[18] Said court further observed that petitioner, or its part, did not plead or allege that under Law 32 the government somehow abandoned these specific projects, or that the public entities to whom the lands were transferred were otherwise exempted from carrying out the statutory goals carefully outlined in Law 489 (Pet. App. 94a-97). *Id.* at 21a.[19]

To be sure, the court of appeals correctly noted that while petitioner did conclusorily and subjectively alleged that "[t]he effect of the law is to abandon a development plan which has been approved and/or adopted by the...Legislature of Puerto Rico and other

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[18] As noted above, Law 32 amended only Section 16 of Law 489 "to read as follows." *See* n. 5, *supra*. It follows that the legislature did not relieve the public entities from carrying out their statutory obligations directed to eliminate the harmful conditions. *See Id.*

[19] The amended statute simply transferred to respondents lands on which they will carry out a comprehensive project that seeks to eliminate hazards affecting society and the environment, as well as to eradicate urban blight. It is the same as if every time a specific public project was to be carried out in the area, the agency in charge of carrying out such work condemned from petitioner each particular plot necessary for each particular work. But the legislature chose the broader approach, and the Constitution allows it. *See Berman*, 348 U.S. at 35 ("community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.")

state entities" (1st Cir. App. 13), petitioner never developed this argument to mean that the legislature abandoned the goal of eliminating conditions harmful to the public in the lands at issue. *See* Pet. App. 20a-21a ("[T]he Fideicomiso further argues [that] Law 32's alleged confiscation and transfer of lands to public agencies bears no reasonable relationship to any possible legitimate purpose. This is so not least because Law 32, in the Fideicomiso's view, relieves public agencies from the obligation to advance the goals of the ENLACE Project identified in Law 489. These goals in Law 489 are indisputably public purposes."). Petitioner rather developed the argument as follows:

> "Law 32 deprives a single entity of its assets, preventing it from carrying out its very purpose....The Fideicomiso would cease to exist, and its members will likely face dislocation and the dissolution of their community. ...This result would also be contrary to the purpose of the existing comprehensive plan for the District to promote economic progress while assuring against displacement of community residents."
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> *Petitioner's Supplemental Brief on the remedies Available on the takings Claim at 5.*

See also Petition for Panel Rehearing and/or rehearing En Banc at 4-6. Thus, petitioner's argument was—albeit conclusorily[20]—that the effect of Law 32

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[20] Said allegation, standing alone, is insufficient to state a claim. *See Iqbal*, 129 S.Ct. at 1951. Thus even if a pretext claim was theoretically cognizable in the face of multiple, concededly quintessential public uses, these undeveloped, speculative and wholly conclusory allegation in Petitioners' complaint could not support a claim of pretext.

would be to abandon a secondary goal of Law 489 (try to avoid displacement of the communities), not that through the amendment the legislature refrained from further carrying out the public purposes directed to eliminate the harmful conditions, or that it relieved respondents from their statutory duties (Pet. App. 94a-97a).

Accordingly, the court of appeals held that there was no objective reason to believe that the public use of these lands had ceased. More specifically, (1) as petitioner conceded that the public projects to be carried out on the lands at issue under Law 489 satisfy the Public Use Clause, (2) the amendment, by its own terms, left intact the statutory mandate—and the obligation of public entities—to carry out the projects, and (3) petitioner did not plead that through the amendment this somehow changed; the court of appeals reasoned that petitioner had failed to provide any objective, non-conclusory factual indication which would lend itself to the plausible inference that the legislature's stated purpose is not really a public one. Pet. App. 22a-23a.

This rationale shows why plaintiff has failed to present a pretext claim. As noted above, the essence of a pretext claim is that the actual or primary purpose of the taking is not a public one. Because petitioner failed to argue that the legislature's primary purpose to eliminate conditions harmful to the public has been abandoned by an amendment the facially preserves such purpose intact, there is no objective indication here on which a plausible inference may be drawn that the purpose behind the statute is not really a public one. Accordingly, a "pretext" claim has not been properly presented.

B. Petitioner's Failure To Identify Specific Private Parties Whom The Statute Is Primarily Designed To Benefit Defeats Any Pretext Claim

Notwithstanding petitioner's failure to even suggest that the amendment somehow eradicated the primary purpose of the measure—to eliminate conditions harmful to the public in these public lands—petitioner also did not affirmatively allege that the amendment was, in fact, "adopted 'to benefit a particular class of identifiable individuals,'" with incidental or no public purpose whatsoever. *Kelo*, 454 U.S. at 478 (quoting *Midkiff*, 467 U.S., at 245). *See also Id.* at 490 (Kennedy, J., concurring). Actually, petitioner admits that although the amendment "contemplates the possibility of providing land titles to individuals," these are yet "to be evaluated by [the] government agencies." *See* 1st Cir. App. 13. Thus, from the outset petitioner failed to properly present an essential element of its takings claim—identifying the specific private individuals whom a statute is primarily designed to favor. *See Kelo*, 545 U.S. at 478, n.6.

Even in this Court, petitioner does not state that the *actual and primary* purpose behind the statute is to confer private benefits. Specifically, while in this court petitioner conclusorily suggests that individuals may benefit, it has not affirmatively alleged that benefiting them is the actual purpose behind the statute. Petitioner's argument is that in its complaint (Pet. 14) it pled that the Mayor of San Juan—who is not part of the legislature—"has already appeared publicly declaring that his intention is to provide land titles to private individuals, and the Municipality has sent vehicles to the area with speakers

exhorting citizens to communicate with a Municipal agency in order to accelerate the process." 1st Cir. App. 14. Specifically, petitioner noted in the complaint that:

> The law also provides for a process whereby the Municipality of San Juan will begin to undertake studies, in conjunction with agencies of the Commonwealth..., in order to ... consider the qualification of residents to acquire land in the district. The law contemplates the possibility of providing land titles to individuals who are to be evaluated by these government agencies, *but there is no guarantee that there will be such transfers*.
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> 1st Cir. App. 13.

See also, Reply Brief of Appellant Petitioner at 43(1st Cir. Case No. 09-1911) ("The true effect of the law is to confiscate the land of the Fideicomiso, and perhaps pass it on to some individual residents[.]") But this does not mean that the *actual* purpose of the legislature was to give away the lands immediately and indiscriminately to private individuals, and to set aside the more important public purposes in Law 489.[21] This argument, moreover, fails in the face

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[21] For all purposes this reflects that the Mayor (who himself is not even a member of the legislature) was merely exhorting the residents to assist the Municipality and other agencies in studying the lands, as mandated by Law 32, but not that it was to give away the lands where public works have to be performed so as to even raise suspicion. Even if the Mayor intended to transfer lands to individual residents after the conditions harmful to the public were eliminated, moreover, this would in no way make the taking unconstitutional in light of the various, public purposes of Law 489 stated above.

of petitioner's admission below—that there is no certainty that individuals will receive even incidental benefits from the amendment. *See Id.*[22]

Accordingly, petitioner has failed to present a plausible allegation that the actual and primary purpose behind Law 32 is, in fact, to favor particular, identifiable private individuals.

C. Because Petitioner Persuaded the First Circuit to Resolve the Merits of the Case After Oral Argument The Court Should Reject its Question Presented

Petitioner's question to this Court concerns whether its alleged claim was properly "dismissed at the pleadings stage simply because the government can advance in litigation a *post hoc* purpose that appears facially valid." Pet. i. Even assuming that petitioner's claim was properly presented to the courts below, however, petitioner was afforded the opportunity to file a supplemental brief after oral argument where it could develop any argument it desired. Petitioner, nevertheless, used this opportunity to rehash its prior arguments. It also explicitly endorsed the court of appeals to resolve the case on the merits. *See Plaintiff's Supplemental Brief on the Remedies Available on the Takings Claim* at 13 ("The general rule limiting appellate jurisdiction to those matters necessary to decide the appeal is one of 'orderly judicial administration,' rather than 'jurisdiction.'... Accordingly, relief in this court is not limited to the

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[22] Petitioner has also failed to explained how statements made after the Law 32 was passed, by a person who is not even part of the legislature (the Mayor of San Juan), somehow provide insight into the intent of the legislature in enacting Law 32.

abstention decision....This Court has the power to [ ] decide the merits of this case at this juncture[.]") This goes to show that petitioner at the time understood that it had presented its case, and that there was nothing to add, even as to any possible argument made by respondents. It should not be allowed to, as it now tries to do, reverse this tactical decision by claiming that its claims were improperly dismissed on the merits at the pleadings stage.

II. THIS CASE DOES NOT PRESENT ANY QUESTION UNDER THE TAKINGS CLAUSE THAT WARRANTS THIS COURT'S REVIEW

Even if this Court were to overlook the severe problems with petitioner's presentation of its constitutional claim, it should deny review. Petitioner argues that the decision below is incorrect under *Kelo v. City of New London*, 545 U.S. 469 (2005). Petitioner also alleges that the decision conflicts with the decisions of the Court of Appeals of the District of Columbia and the State of Hawaii, and that there is general confusion among lower courts as to how to adjudicate a pretext claim. In rejecting petitioner's claim, however, the court of appeals properly applied the well-settled standards applicable to pleadings, and to Public Use challenges, which render consideration of any possible "pretext" claim unnecessary.

A. The Decision Below Does Not Conflict With this Court's Precedent

The court of appeals faithfully followed this Court's precedents in determining whether respondents had demonstrated the existence of a public use. Petitioner argues that this Court has instructed lower courts that, notwithstanding the objectively demonstrated existence of a valid public use, a Takings claim

cannot be dismissed at the pleadings stage for failure to state a claim. This Court has never so held. *See e.g., Goldstein*, 516 F.3d at 63; *Carole Media*, 550 F.3d at 311.

Petitioner's reliance on *Kelo* is misplaced. This case does not concern a project whose primary purpose is to create jobs, generate tax revenues, help "build momentum for the rehabilitation of" an area, make an area "attractive," or create leisure and recreational opportunities." *Kelo*, 545 U.S., at 474-75. Rather the primary purposes here are namely "[t]o enable the rehabilitation of the San Juan Bay Estuary, improve the quality of life of its waters and the habitat of its fauna and wildlife by broadening and dredging of the Martín Peña Canal and a conservation strip along both banks thereof." *See* Pet. App. 70. The purpose is also "[t]o improve the living conditions of the approximately thirty thousand [ ] residents of the eight communities located along both sides of the Canal in the areas of public sanitation, housing, ordinance and quality of the urban spaces and infrastructure." *Id.* at 71a. The Development Plan shows—and plaintiff admits to—the comprehensiveness of these measures and the principal purposes thereof. "The Caño's rehabilitation through dredging and channeling is the most important action and of potentially the largest environmental impact that the ENLACE Project has....Works related to the dredging and channeling of the Caño, and to the reformation of the communities (infrastructure, urban development) involve relocation of a significant amount of families." 1st Cir. App. 1434. The plan also notes that "[t]he neighboring communities...are affected by the Caño's current state, the precarious housing and infrastructure conditions...The lack of a sewer system results in high levels of pollution...Rain

episodes set off frequent floods in the Caño and the overflow of the storm sewer system, exposing the District's residents to polluted waters." *Id.* at 14 31.

In essence, the primary public purpose here is to eliminate conditions harmful to the public—a purpose which was not even present in *Kelo*. Accordingly, the particular factual rationale in *Kelo* is not applicable to the facts of this case, but rather what is applicable is the Court's long standing precedent that the elimination of conditions harmful to the public is primarily a valid prerogative of the States.[23] When such purposes are present, eight members of the *Kelo* Court were—and a firm line of precedent is—in agreement that the public use requirement is satisfied. *See Berman*, 348 U.S. at 32 ("Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs.") *See also Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting) ("The Court's holdings in *Berman* and *Midkiff* were true to the principle underlying the Public Use Clause. In both those cases, the extraordinary, pre-condemnation use of the targeted property inflicted affirmative harm on society.") Specifically, this line of precedent recognizes that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent

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[23] As also noted, petitioner does not contend that the lands in question were not necessary to carry out the project but rather effectively concedes that they are. Therefore, all that the legislature did was take them once and for all rather than incur in a lot by lot approach. Also, petitioner has never alleged what is known as "excess condemnation." *See, e.g., City of Cincinnati v. Vester*, 281 U.S. 439 (1930)

domain is merely the means to the end." *Berman*, 348 U.S., at 33.

Yet, in this case the end—to eliminate the harmful conditions—is not in dispute. *See Petition for Panel Rehearing and/or rehearing En Banc* at 4 ("There can be no doubt that both Law 489 and the 2006 Development Plan approved pursuant thereto satisfy 'public use.'") And, as noted above, the very terms of Law 32 objectively make clear that the particular end here has not been abandoned. Neither does petitioner argue, not even in this Court, that these principal purposes were somehow abandoned by the passage of the amendment.[24] Thus, it is uncontested that the lands at issue here are destined to the type of "public use" that has been deemed acceptable by this Court for decades. Petitioner nonetheless complains that the court of appeals erred by dismissing its pretext claim on the pleadings stage.

Assuming that petitioner properly pled a pretext claim, however, the argument fails to consider that

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[24] Furthermore, although, as the First Circuit noted, petitioner did not argue that "[t]he fact that under Law 489 the land may, after improvements, be leased to private parties does not mean that Law 489 lacks a public purpose" (Pet. App. 21a, n.7), this argument would fail regardless. Specifically, the fact that under Law 32 the government may ultimately decide to transfer some parcels to individual private parties rather than to the trust—after improvements are carried out, or those lands which it understands that individual residents can improve, in harmony with the overall plan—does not render the project unconstitutional. *See Berman*, 348 U.S., at 30 ("After the real estate has been assembled, the Agency is authorized to transfer to public agencies the land to be devoted to such public purposes as streets, utilities, recreational facilities, and schools,...and to lease or sell the remainder as an entirety or in parts to a redevelopment company, individual, or partnership.")

the court of appeals determined, based on objective factors, that the principal purpose of the legislature—to eliminate conditions harmful to the public in these lands—*independently* satisfied the Public Use Clause. *See Goldstein*, 516 F.3d at 63 ("[W]e hold today that where, as here, a [taking] is justified in reference to several classic public uses whose objective basis is not in doubt, we must...reject any claims that the purported public uses are mere pretexts for an impermissible private purpose.") Put differently, where, as here, the primary purpose of the legislature is to eliminate conditions harmful to the public in a specific area, and the legislative history, and even petitioner's own pleadings, indisputably establish that this recognized public purpose remains in effect despite a re-transfer of the lands, this Court has never held that a Takings Clause claim may not be dismissed as a matter of law.

B. There Is No Conflict Among Lower Courts that Warrants this Court's Attention

Petitioner argues that the decision below conflicts with decisions of the Court of Appeals of the District of Columbia in *Franco v. National Capitol Revitalization Corp.*, 930 A.2d 160 (D.C. 2007), and the Supreme Court of Hawaii in *County of Hawai'i v. C&J Coupe Family Lt. P'ship*, 198 P.3d 615 (Haw. 2008). Petitioner specifically argues that such courts have explained "that there may be situations" where a court does not have to take at face value the legislature's public use determination so that dismissal on the pleadings stage will not be proper. *See* Pet. 18 (*quoting Franco*, 930 A.2d at 169).

Such sparse and undeveloped case law in itself strongly militates against this Court's review. Moreover, neither of those two cases hold that a complaint may not be dismissed at the pleadings stage where, as here, a plaintiff has failed to provide specific facts which would lend themselves to the plausible inference that the state action at issue is a pretext to favor particular identifiable private individuals, with no, or incidental public benefits. Indeed, the Second and Third Circuits have recognized the approach taken by the first Circuit here. *See Goldstein v. Pataki*, 516 F.3d at 60-64; *Carole Media LLC*, 550 F.3d at 311. And even the very cases cited by petitioner do not conflict with this proposition.

In *Franco* the court paid close attention to the facts alleged, and duly considered whether these were sufficient to plead a pretext claim before allowing such a claim to go forward. *See Franco*, 930 A.2d at 170-72. Mr. Franco specifically denied that the area in question there was blighted, and specifically argued that the sole objective of the condemnation was to "'design and build a new shopping center on cite for [a specific private developer's] own account." *Id.* at 171. Likewise, in *C&J Coupe*, C&J Coupe specifically argued that "the asserted public purpose was a pretext...to hide the predominantly private benefit of the Hokuli'a access road to Oceanside"—a private developer who was seeking a direct access to a private community it was developing. 198 P.3d at 644.[25] Thus, in both cases the opponent of the con-

[25] In *C&J Coupe*, moreover, the developer had entered into a development agreement with the County of Hawaii in which the county agreed that if the developer's efforts to negotiate to acquire neighboring private property for the road failed, the county would be obligated at the developer's "sole discretion" to

demnation argued that the principal purpose behind the taking was to benefit specific individuals, with no—or merely incidental—public benefits.[26]

But these cases do not stand for the proposition that when these essential factors are absent, a court may not dismiss a claim alleging a pretextual taking as a matter of law. Where, as here, a court is confronted with a statutory public use which the plaintiff admits to be constitutionally valid, and the legislature amends the statute but it is not disputed that such public use remains, there can be no doubt that the requirement of the Public Use Clause—that the actual and primary purpose behind the action be a public one—has been satisfied. Likewise, where there is not a single argument as to how the alleged action is predominantly directed to confer a private benefit upon specific individuals, a plaintiff has failed to properly plead a "pretext" claim. Under either of these scenarios there is no plausible indication that an impermissible favoritism is at stake, or that the public use requirement will not be satisfied. In any

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use its power of eminent domain to take the land, that the developer had the "sole discretion" to determine what property the county must take, and that the developer had the "sole and absolute discretion" to determine when possession of property was needed. *See C&J Coupe*, 198 P.3d at 622.

[26] Both *Franco* and *C&J Coupe*, moreover, involved instances where the condemning authorities or lower courts had rested on conclusory determinations that the "properties were 'necessary and desirable for the public use,' but did not explain why the properties were 'necessary' or to what 'public use' they would be devoted." *Franco*, 930 A.2d at 163. *See also C&J Coupe*, 198 P.3d at 647 ("[i]t is not discernible that the court based its determination of public purpose on anything more than the fact that [the] county resolution [ ] states that the proposed construction and use of the [bypass] would provide a public benefit to the county of Hawaii[.]")

event, petitioner considerably overstates the distance between those two decisions, which reflect no more than a difference in judgment as to the appropriate outcome of particular cases under settled legal standards—pleadings standards, and Public Use Clause challenges standards—which, if properly applied, can undoubtedly be used to dismiss any alleged claim of pretext as a matter of law. That is not a basis for review in this Court in Certiorari. *See* S. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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